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In The  
**Supreme Court of the United States**  
October Term, 1989

PORTLAND AUDUBON SOCIETY, *et al.*,

*Petitioners,*

v.

MANUEL LUJAN, JR., in his official capacity  
as Secretary, United States Department of Interior,  
and

NORTHWEST FOREST RESOURCE COUNCIL, *et al.*,

*Respondents.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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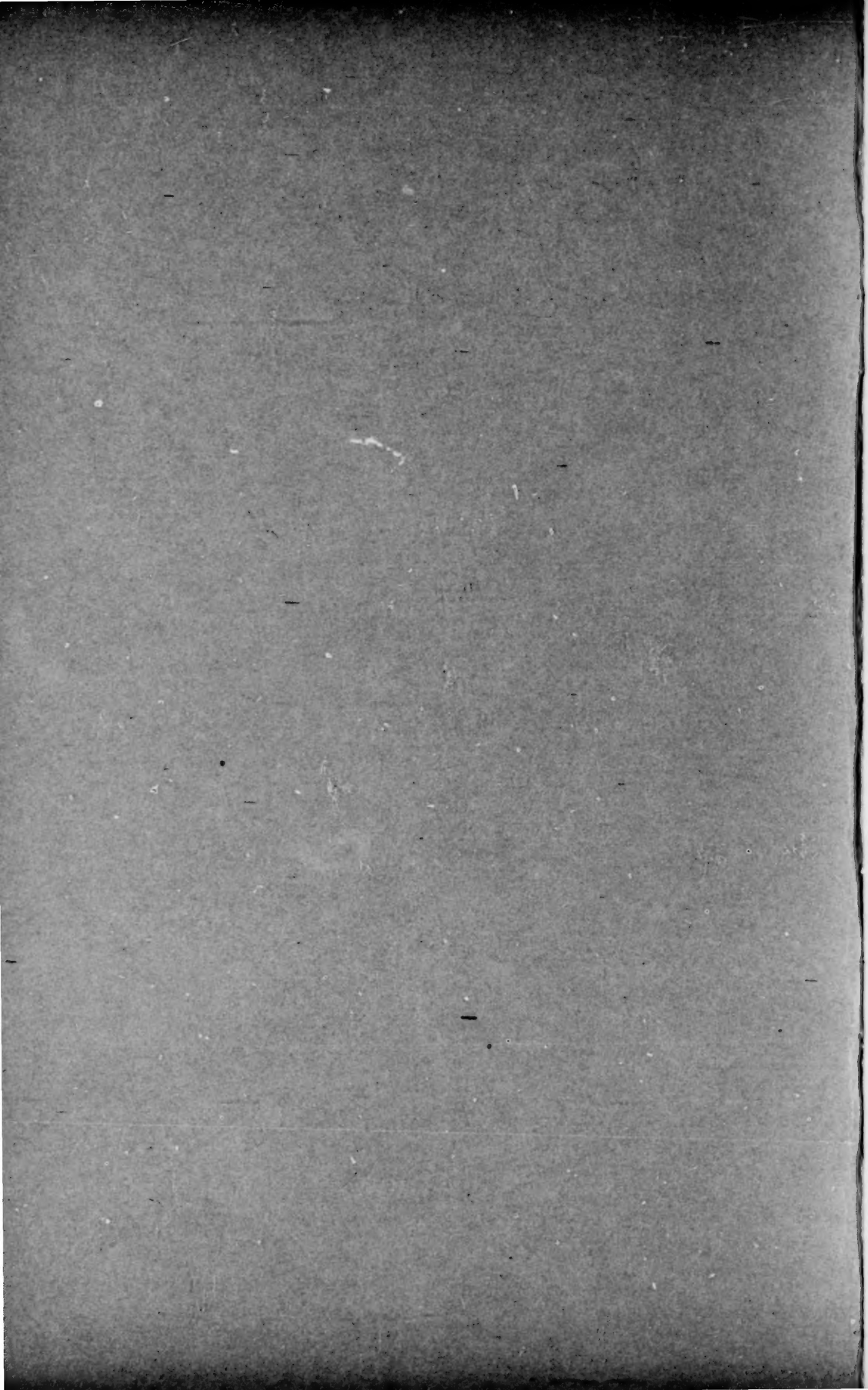
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## ARGUMENT

Respondents' attempts to trivialize the court of appeals' decision in this case should be rejected for at least three reasons. First, the Ninth Circuit's opinion insulates from judicial review federal agency conduct that threatens to drive a species extinct. This implicates precisely the fundamental public interests on which this Court frequently bases certiorari.

Second, the Ninth Circuit departed dramatically from rules of this Court concerning interpretation of statutes that limit judicial review. The court decided to preclude judicial review based on language which it had previously found "anything but clear." Neither this Court nor any lower court tolerates revoking access to the federal courts by implication, as the Ninth Circuit did here.

Finally, respondents' argument that because appropriations bills are not proposals for permanent legislation there is no reason to consider Section 314's effect simply ignores reality. Section 314 has been enacted and reenacted – unchanged – three times by Congress. It is preventing judicial review of the destruction of ancient forests even as this brief is being written. It has become a fixture in the federal appropriations process that is routinely reenacted each year. This Court has reviewed aberrant appropriations provisions in the past, and should do so in this case.

The Ninth Circuit's ruling in this case has far-reaching implications for the relationship between the Courts and the Executive. This Court should grant this petition to review – and correct – the lower court's errors.

**I. THIS COURT HAS FREQUENTLY GRANTED CERTIORARI TO REVIEW IMPORTANT QUESTIONS CONCERNING THE PUBLIC'S LANDS, AND SHOULD DO SO IN THIS CASE**

This Court has often "granted certiorari because of the importance of [a] question to the management of the public lands," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 663 (1980); *United States v. Coleman*, 390 U.S. 599, 601 (1968). Certiorari has been granted, for example, where (as here) statutory interpretation affects local wildlife species and their habitat, *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (Devil's Hole Pool and its rare fish inhabitants are protected "objects of historic or scientific interest"), where (as here) the trustee relationship between Congress, the public and our nation's public lands is involved, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Congress has the power to protect wildlife on the public lands), and where (as here) the appropriations process raises questions about the applicability of environmental statutes. *Andrus v. Sierra Club*, 442 U.S. 347 (1979) (appropriations are not proposals for legislation requiring EIS revisions).

The interests at issue in these past public land cases, while significant, pale in comparison to the interests involved in this case. Northern spotted owls – whose old-growth habitat predates our Nation's history – face a significant risk of extinction. The United States Fish and Wildlife Service has recognized:

Impacts from timber harvesting are rangewide and, in addition to causing the direct loss of preferred habitat, appear to be affecting the quality of the remaining forest habitat throughout much of the species' range. . . . Current and proposed management practices may not be designed for nor be sufficient to ensure long-term

population viability of the spotted owl. On the basis of the best scientific and commercial data available, the Service believes that threatened status is warranted rangewide for the entire population of the northern spotted owl.

Proposed Rules on the Threatened Status for the Northern Spotted Owl, Dept. of the Interior, U.S. Fish and Wildlife Service, 54 Fed. Reg. 26666, 26675 (Friday, June 23, 1989).

In addition, the spotted owl is a migratory bird<sup>1</sup> protected internationally by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, a conservation statute "designed to prevent the destruction of certain species of birds." *Andrus v. Allard*, 444 U.S. 51, 52 (1979). "The protection of migratory birds has long been recognized as a 'national interest of very nearly the first magnitude.'" *North Dakota v. United States*, 460 U.S. 300, 309 (1983) quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

This case involves illegal agency action<sup>2</sup> contributing to the risk of extinction of a species. The interests involved amply warrant this Court's attention.

## II. THIS CASE INVOLVES IMPORTANT PRINCIPLES OF STATUTORY INTERPRETATION

Contrary to respondents' argument that the Ninth Circuit's opinion does not implicate important principles of statutory interpretation (NFRC Brief at 8), the Ninth Circuit's ruling creates a *direct* conflict with this Court's prior decisions. Those decisions recognize a "strong

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<sup>1</sup> See 50 C.F.R. § 10.13.

<sup>2</sup> The district court has determined that the defendant's refusal to prepare a supplemental EIS pursuant to NEPA was "arbitrary and capricious." App. C at 114-15.

presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). This Court has repeatedly stated that where there is "substantial doubt" about congressional intent to preclude judicial review in a particular case, the presumption favoring judicial review is controlling. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) quoting *Rusk v. Cort*, 369 U.S. 367, 380 (1962).

The Ninth Circuit did *not* find, as it was required to do by these previous opinions of the Court, that statutory preclusion of judicial review was demonstrated "clearly and convincingly." *National Labor Relations Board v. United Food and Commercial Workers Union*, 484 U.S. 112, 131 (1987). In fact, the Ninth Circuit specifically found in its *first* opinion that § 314 was ambiguous and that there *was* substantial doubt about Congressional intent. In that opinion the Ninth Circuit concluded:

The Section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans," while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged." The trial court interpreted this extraordinary language as a clear withdrawal of jurisdiction. *We find it anything but clear.*

App. B at A-29 (emphasis added).<sup>3</sup>

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<sup>3</sup> NFRC, in an attempt to downplay the fact that the Ninth Circuit's two opinions in this case contradict each other, cites to *Davis v. United States*, 417 U.S. 333 (1974) for the proposition

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Section 314 by its terms prohibits only challenges to "plans in their entirety" based "solely" on new information. Section 314 expressly reserves the right to challenge "any and all particular activities to be carried out under . . . plans. . . ." <sup>4</sup> Despite the fact that this case challenges timber *sales*, and not timber *plans*, respondents claim that the lower courts were not clearly erroneous in finding that the case challenges timber management plans.

The complaint was appended to the petition for certiorari because even a cursory review of the complaint reveals that it does *not* seek to enjoin implementation of a timber management plan in its entirety. App. E at A-145. The Ninth Circuit's (first) opinion concedes that "the sales [being challenged in this case] are indeed *separate transactions*. They are also *part of an existing plan . . .*" App. B at A-29. For the court to then conclude that § 314, which expressly reserves the right to challenge "any and all particular activities to be carried out under . . . plans . . ." applies to this case, is transparently *wrong*, and directly violates this Court's rules of statutory

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that a conflict within a single circuit does not warrant a writ of certiorari. NFRC Brief at 13. But this Court *has* granted certiorari in cases where there are intracircuit conflicts, and in fact granted such a writ on a second petition for certiorari in *Davis* itself. *Id.* at 341. The language which NFRC cites in *Davis* is not in any event a holding of *Davis*, but simply an argument presented in *Davis*.

<sup>4</sup> Section 314 is but one paragraph in a massive, 450 page appropriations bill. The committees in the House and Senate which oversee judicial review, public lands, and wildlife never even considered § 314.

construction.<sup>5</sup> *Nothing* in § 314 indicates that Congress intended to bar this lawsuit.

The distinction between "plans" and activities *implementing* those plans is well-established. For example, 40 C.F.R. § 1508.18(b) (which implements NEPA) defines "major Federal actions" as:

- (2) Adoption of formal plans, such as official documents prepared by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
- (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; . . . [and]
- (4) Approval of specific projects, such as . . . management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

Timber sales clearly fall within categories (3) and (4), *not* within category (2)'s definition of "plans."

The Ninth Circuit's opinion in this case so flagrantly violates the rules of statutory construction established by this Court that certiorari should be granted to correct the opinion.

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<sup>5</sup> The BLM argues that the facts in this case should be reviewed by the court of appeals pursuant to Fed. R. Civ. P. 52(a) as in civil bench-tryed litigation. BLM's Brief at 15. This case, however, was decided on a motion for summary judgment and *not* after a trial. The lower court's opinion should therefore be reviewed *de novo* to determine whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985).

### III. THE NINTH CIRCUIT'S OPINION ALLOWS THE IMPLIED REPEAL OF THE JUDICIAL REVIEW PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

Respondents dismiss the fact that the Ninth Circuit's opinion impliedly repeals the judicial review provisions of the Administrative Procedures Act (APA),<sup>6</sup> by contending that 5 U.S.C. § 701(a)(1), by its terms, provides that judicial review under the Act is not available where "statutes preclude judicial review." BLM's Brief at 17. Therefore, respondents argue, the Ninth Circuit's interpretation of § 314 to preclude judicial review in this case does not impliedly repeal the APA. This argument is circular. Section 701(a)(1) applies only *after* a court has determined that a statute precludes review. If § 314 unambiguously precluded judicial review in this case, 5 U.S.C. § 701(a)(1) would be relevant. Section 314, however, is ambiguous. Respondents ask the Court to use § 701(a)(1) as an excuse for ignoring the rule against implied preclusion. There is no authority for such a proposition.<sup>7</sup>

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<sup>6</sup> This Court has repeatedly found implied repeals to be repugnant. The Court's general rule disfavoring repeals by implication applies "with *greater* force when the claimed repeal rests solely on an Appropriations Act." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978).

<sup>7</sup> An appropriations measure, in any event, should not be allowed to repeal the judicial review provisions of the APA except under the most extreme circumstances.

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#### IV. SECTION 318 OF THE 1990 FEDERAL APPROPRIATIONS BILL DOES NOT DIMINISH THE IMPORTANCE OF THE NINTH CIRCUIT'S RULING

Respondents argue that "another related statutory provision, Section 318(b)(6)(A), [has] largely eclipsed the legal and practical significance of the decision below." BLM's Brief at 19. It is not clear precisely what this means. The defendant does not claim that this case has been *mooted* by § 318(b)(6)(A), as indeed it could not, since § 318 precludes judicial review *only* of the legality of the guidelines set forth in § 318 itself, and does *not* preclude judicial review of challenges to timber sales or other decisions of the defendant.<sup>8</sup> And the BLM provides no additional clues as to the source of the legal theory

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<sup>8</sup> Section 318 does purport to find, as a *factual* matter, that the defendant's "agreement" with the Oregon Department of Fish and Wildlife is "adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case of Portland Audubon Society et al. v. Manuel Lujan, Jr., Civil No. 87-1160-FR." Plaintiffs have challenged the constitutionality of this language, because it represents an attempt by Congress to decide the facts of a pending case. Such an exercise is an impermissible intrusion upon the core powers of the judiciary. See *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). The Ninth Circuit is currently considering this constitutional issue in two cases that have been consolidated on appeal; *Portland Audubon Society v. Lujan*, Ninth Cir. No. 90-35120, and *Seattle Audubon v. Robertson*, Ninth Cir. Nos. 90-35020, 90-80008. It is likely that, whichever way the Ninth Circuit rules on the constitutionality issue, this Court will be asked to consider that constitutional question as well.

that a case may be "eclipsed" by succeeding legislation.<sup>9</sup> If § 318 "eclipsed" § 314, it would not have been necessary for Congress to reenact § 314 (as § 312) in the same bill as § 318.

Respondents also argue certiorari should be denied because the case does not involve "enduring" provisions of federal law. NFRC Brief at 8; BLM's Brief at 19. But § 314 has been allowed to block citizens' access to the courts since 1987.<sup>10</sup> The provision has become a fixture in the appropriations process, and will "endure" until addressed by the Court.

Respondents' invitation to ignore § 314's repeated reenactment is disingenuous. The BLM is unlikely to change its conduct voluntarily. Despite representations to the Court that new plans and EIS's will be completed in 1990, a Bureau of Land Management memorandum states that completion may take years:

it is becoming evident that because of the difficulties of building a EIS process that will be effective for Western Oregon the RMP [Regional Management Plan] will not be completed until FY 92 and implementation of new allowable

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<sup>9</sup> Respondents contend that Petitioners filing for attorney's fees does not "square" with the filing of this petition for certiorari. BLM's Brief at 20. Apparently respondents believe that, because plaintiffs prevailed *in part* and therefore applied for fees, they must forego their right to challenge the rulings in this case with which they did *not* agree. This is nonsense. A challenge to a specific ruling is not prohibited simply because other rulings went in the challenger's favor.

<sup>10</sup> Section 314 was originally enacted as H.J. Res. 395, § 314. It was reenacted without change as H.R. 4867 in 1988 and again reenacted without change in 1989. This legislation endures in 1990 as § 312 of H.R. 2788 and is found in Pub. L. No. 101-121.

sales quantities will not occur before FY 93. Legal challenges to the RMP and associated allowable cut could result in this date being extended even further.

BLM Working Draft Memorandum, Dick Popp, Western Oregon District, Results of May 15, 1989, Meeting, May 16, 1989, at 9.

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## CONCLUSION

The northern spotted owl is in danger of extinction. As an indicator species for the ancient forests of the Northwest, the owl acts as a canary in the mine shaft. The use of the appropriations process to foreclose judicial review of agency compliance with environmental laws applicable to ancient forests raises issues of clear national significance. This Court should grant certiorari to review that process and those principles.

Respectfully submitted,

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